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IN THE

Supreme Court of the United States

October Term, 1967
No. 535

MICHELE MARCHESE and JESSE DEL BONO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Michele Marchese and Jesse Del Bono respectfully petition for a writ of certiorari to review the judgment or order made by the United States District Court, Southern District of California, and the judgment of affirmation in the Ninth Circuit Court of Appeals. A copy of the order appealed from is hereto attached in Appendix "A", and a copy of the judgment and opinion of the Circuit Court is hereto attached as Appendix "B", and are hereby referred to.

Petitioners were convicted of violation of the narcotics laws, Section 174 of Title 21 U.S.C. and Conspiracy, Title 18, Section 371 U.S.C. and on June 16, 1958, were sentenced by Judge Thurmond Clarke, who tried the case, to ten years on each count, the sentences to run concurrently. On April 15, 1959, the Ninth Circuit Court affirmed the judgment of conviction

without opinion (264 F. 2d 892) and certiorari was denied June 29, 1959. On July 10, 1959, petitioners began serving their sentences although they had served some time in custody prior thereto.

On December 22, 1960, United States District Court Judge Thurmond Clarke denied petitioners' motions to annul, vacate and set aside the judgment under the provisions of Section 2255 of Title 28, U.S.C. Inadvertently they let the time for appeal expire. On June 20, 1961, Marchese, who was then in custody at the Federal Correctional Institution at Terminal Island, Los Angeles, California, filed a petition for habeas corpus. Since Judge Clarke was away, Judge Pierson Hall denied and dismissed the petition *ex parte* without notice or hearing.

The petition contained several grounds for the collateral attack on the judgment, among which were the perjury allegedly committed by Narcotics Agent Richards at the trial and the knowing use of such perjured testimony by the prosecutor.[1] The principal ground

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[1]At the hearing on the Marchese case when Judge Clarke discharged petitioner, he found that Agent Malcolm Richards was guilty of perjury and that the prosecution had suppressed or failed to disclose information and evidence favorable to the petitioner at the time of trial. On the appeal by the Government, the Circuit Court, disregarding rules of appellate review found to the contrary. (See its opinion 341 F. 2d 782 as to a detailed discussion of findings and conclusions. See also the petition for certiorari No. 157, October Term 1964 for a detailed discussion of this issue. We respectfully request that this Court review and pass upon such issues in addition to those herein presented, in view of the recent decisions of this Court respecting the suppression of evidence by the prosecution, namely: *Sims v. Georgia*, 17 L. Ed. 593; *Miller v. Pate*, 17 L. Ed. 2d 690; *Washington v. Texas*, 18 L. Ed. 1019; *Giles v. Maryland*, 17 L. Ed. 737. In *Giles* the Court stated page 744:

"In *Napue v. Illinois*, 360 U.S. at 269, 3 L. ed. at 1220 we held that a conviction must fall under the Fourteenth

of the petition was the use by the agents of a transmitting device concealed on the person of Donald Sussman, a narcotics addict, and a long time friend of Marchese. By means of the device, officers were enabled to hear, by a receiving device, the conversations taking place between Sussman and Marchese in the privacy of Marchese's apartment. This was in violation of petitioner's rights of privacy under the Fourth and Fifth Amendments.

Marchese appealed from the order denying and dismissing his petition, and the Ninth Circuit Court affirmed the order on May 31, 1962 (304 F. 2d 154). In its opinion, the Court avoided a direct ruling on any of the grounds set forth in the petition for habeas corpus, holding merely that Marchese had no basis for such petition, because the issues had been covered in the former appeal and in the denial of motions previously made, as above set forth, under Section 2255 of Title 28, U.S.C.

On June 10, 1963, the Supreme Court of the United States granted certiorari reversing the Circuit Court and remanding the case (374 U.S. 101). Its order read as follows:

"*Per Curiam.*

"The petition for writ of certiorari is granted, the judgment vacated and the case remanded to the United States District Court for the Southern District of California for reconsideration in the light of *Sanders v. United States*, 373 U.S. 1."

Amendment when the prosecution 'although not soliciting false evidence, allows it to go uncontradicted when it appears' even though the testimony may be relevant only to the credibility of a witness."

At the hearing for reconsideration in the District Court, Judge Thurmond Clarke granted the petition, reduced the sentence of petitioner to five years and discharged him for time served, since he had already served four years and four months with an excellent prison record. The court found: that perjury had been committed by Agent Richards; that it was knowingly used by the prosecutor; that the electronic device had been used on three occasions concealed on Sussman's person and by means of a receiving device officers at a distance from Marchese's apartment were able to overhear what was said in the apartment and permitted over defendants' objections to testify concerning the same. The court concluded that since petitioner was tried in said court and that since petitioner was in custody within its territorial jurisdiction, it could treat Marchese's petition interchangeably as a petition for habeas corpus or as a motion under Section 2255 of Title 28, U.S.C. and that it had jurisdiction to determine the matter and to grant such relief as might appear appropriate. The court further concluded: that petitioner's constitutional rights had been so denied and infringed upon as to render the judgment subject to collateral attack; that it would be fair, equitable and just to reduce the sentence to five years; and that because he had earned good time in custody, he should be ordered immediately discharged from custody. A copy of the judgment of discharge is hereto attached as Appendix "C". The Government appealed from said judgment.

On November 12, 1963, Del Bono filed a petition to annul, vacate, set aside or modify the judgment of conviction against him pursuant to the provisions of

Section 2255 and 2243 of Title 28 on several of the same grounds as set forth in Marchese's petition and motion. Following a hearing, Judge Clarke rendered a similar order for Del Bono, a copy of which is set forth as Appendix "D", and the Government appealed.

On February 10, 1965, the Ninth Circuit Court reversed the said judgment (341 F. 2d 782). In its lengthy opinion, the Court spent most of its time discussing the perjury issue and disregarding the rules of appellate review, held that the findings as to the commission and use of perjury were not supported by the evidence.[1] The Court completely avoided a direct ruling, as it had done in the former appeals on the issue of violation of petitioners' constitutional rights of privacy under the Fourth and Fifth Amendments through the use of a hidden electronic transmitting device. (Reference is respectfully made to the petition for certiorari in the Supreme Court No. 157, October Term 1964 for a detailed discussion.)

Following the denial of certiorari by the Supreme Court (382 U.S. 817), petitioners made motions before Judge Clarke to file amended findings of fact, conclusions of law and judgment to conform to the limitations erroneously placed by the Circuit Court on the type and extent of the relief the District Court could grant in the case, especially as the opinion of the Circuit Court was somewhat ambiguous. On January 19th and 20th, Judge Clarke denied said motions without prejudice pending clarification by the Circuit Court as to his powers and jurisdiction in the matter, and certified the cases to the Circuit Court for clarification. He also reserved ruling on whether to treat the motions as new motions and petitions under Sections 2255 and

2243 of Title 28. Since no formal order was then made a *nunc pro tunc* order was thereafter made embodying his order from the bench, a copy of which referred to *supra* is attached Appendix "A".

On May 25, 1967, the Circuit Court, instead of clarifying his powers and jurisdiction, held that Judge Clarke was right in denying the motions. On June 19, 1967, a petition for rehearing was denied, including a motion to withhold mandate and judgment and stay execution of judgment. Also, the suggestion of hearing *en banc* was denied. The opinion has not yet been printed, but a copy of the opinion and judgment is attached as Appendix "B".

Facts of Case.

We shall confine the statement of facts primarily to those pertinent to the violation of petitioners' constitutional rights under the Fourth and Fifth Amendments.

One Donald Sussman, a narcotics addict, was a long time friend of Marchese, and Marchese has spent considerable money to have Sussman cured of his addiction without success. On May 25, 1956, Sussman had been convicted of violating California's narcotic laws and was placed on probation for five years. On January 29th, 1958, he was arrested by Agent Richards of the Federal Narcotics Bureau and taken to a conference with Howard Chappel, head of the Bureau, and other agents, in the Federal Building in Los Angeles. As a result of an arrangement made with Sussman, he was released O.R. and called upon Marchese in the latter's apartment the next day, January 30th. He was equipped by the agents with a Schmidt transmit-

ter, an electronic transmitting device, concealed on his person. The conversation between him and Marchese, unknown to the latter, was transmitted and listened to by Richards and Los Angeles County Deputy Sheriff Farrington at some distance from the apartment by means of a receiving device. This procedure was repeated on January 31st, and February 7th. At the trial Sussman testified that he was informed that the conversation was recorded and that each time he signed the transcription of the record. Following a recess, when he resumed the stand, the Assistant United States Attorney elicited from his testimony that there was no actual recording. At the trial the Government witnesses stated that there was no recording. Richards and Farrington were permitted over defendants' objection to testify as to what they overheard, even though they admitted they could hear only parts of the conversations. Their testimony was somewhat in conflict with that of Sussman and of each other, but their testimony was very prejudicial to defendants.

As a result of Sussman's cooperation, the charge against him under Section 174 of Title 21 U.S.C., was dismissed and a charge under a tax count was substituted (Secs. 4704 (a) and 7237, Title 26, U.S.C.) and Sussman received great leniency in that he was sentenced to two years only and sent to Fort Worth, Texas, where narcotic addicts receive treatment. Through the efforts of Richards, his state probation was also terminated during his custody at Fort Worth.

Jurisdiction.

Jurisdiction is conferred on this Court by Title 28, Section 1254(1) U.S.C. to review the judgment in question.

Statutes Involved.

Title 18 Section 371 U.S.C. (Conspiracy).
Title 21 Section 174 U.S.C. (Narcotic Act).
Fourth Amendment to U.S. Constitution.
Fifth Amendment to U.S. Constitution.
Title 28 Sections 2241(a), 2243 and 2255 U.S.C.
Title 18 Sections 4161-4164 U.S.C.

The aforesaid Section 2255 provides in part as follows:

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgment and shall discharge the prisoner or re-sentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Section 2243 provides in part with respect to the application for a writ of habeas corpus as follows:

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Questions Presented by This Writ.

1. Whether the use of an electronic transmitting device, a Schmidt transmitter, concealed by government agents on the person of Sussman, a so-called "special employee" of the government, whereby conversations between Sussman and Marchese in the privacy of the latter's apartment were overheard by officers at a distance from the apartment by a receiving device, and their testimony admitted over defense objection, constituted a violation of petitioners' constitutional rights of privacy under the Fourth and Fifth Amendments of the United States Constitution?

2. Whether the United States District Court Judge Clarke had the power and jurisdiction to grant the relief ordered by him under the pvorisions of Sections 2243 (*habeas corpus*) and 2255 (motion procedure) of Title 28, U.S.C., namely to reduce the sen-

tence of petitioners, and/or to discharge them for time served or, on remand by the Circuit Court, to grant a complete discharge?

3. Whether the Circuit Court had the power and jurisdiction to restrict, set aside, vacate and reverse Judge Clarke's order discharging petitioners under Sections 2243 and/or 2255 of Title 28 U.S.C.?

Reasons for Granting the Writ.

1. This case involves important questions of constitutional rights under the Fourth and Fifth Amendments, which should be settled by this Court, namely whether there is a violation of constitutional rights by reason of the use by the Government of transmitting devices concealed on the persons of their agents, employees or stool pigeons, or so-called "special employees", whereby officers may listen, by means of receiving devices, to conversations of suspects within the privacy of the latters' homes and thereafter such officers be permitted to testify in court in prosecutions as to what they overheard. These particular questions have not been definitely determined by this Court, although in *Lopez v. United States*, 373 U.S. 427, there were implications that the above constituted a violation of constitutional rights, and in subsequent cases this Court has touched the fringes of the question. The decision of the Circuit Court is in conflict with apparent views of this Court.

2. This case should be considered along with the case of *Katz v. United States*, 369 F. 2d 130, in which this Court granted certiorari and has set the case for argument on October 6, 1967. The *Katz* case involves the use of a recording device affixed to the outside of

a public telephone booth used by Katz, by means of which his end of the telephone conversation was recorded and the tape admitted into evidence. The case of petitioners herein involves as does *Katz* the invasion of rights of privacy.

3. The Ninth Circuit Court erroneously held that Judge Clarke had no power to reduce the sentence of petitioners from 10 years to 5 years, or discharge petitioners for time served, even though he deemed such discharge fair, equitable and just and that it was "what law and justice require" . (Judge Clarke was the trier of the case and imposed the sentences.) The Court's decision was in conflict with decisions of other Circuit Courts and the decision with respect to the above matters involves an important question of federal law which should be settled by this Court.

4. The Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT.

I.

The Use by Government Agents of the Electronic Transmitter Concealed on the Person of Their "Special Employee" Whereby They Were Enabled to Overhear Conversations Taking Place in Marchese's Apartment by Means of a Receiving Device Some Distance From the Apartment Constituted a Violation of Petitioners' Rights of Privacy, and Constitutional Rights Under the Fourth and Fifth Amendments of the Constitution.

In the case of *On Lee v. United States*, 343 U.S. 747, the use of such a device hidden on the person of Chin Poy by government agents was upheld, but the transmission took place on the streets of New York and in the portion of On Lee's laundry to which the public was invited. In the brief of the Solicitor General in that case, he made a distinction between the use of such a device in a public place and in a home, contending that in a public place such a device would be permissible where it might not be so in a home. In the instant case, the distinction clearly existed since the transmission took place from Marchese's apartment.

On appeal from the judgment by Judge Hall dismissing Marchese's petition for habeas corpus, the Circuit Court again avoided a direct ruling on the aforesaid issue and affirmed the judgment of dismissal. The Supreme Court, however, as pointed out above granted certiorari and reversed the judgment. About two weeks prior thereto, it decided the case of *Lopez v. United States*, 373 U.S. 427. In that case, an Internal Revenue Agent called upon *Lopez* with, concealed on his

person, both a recording device and a transmitting device. *Lopez* knew he was an agent and that whatever he, Lopez, said might be used against him. The recording device worked but the transmitting device did not. This Court held that the tape recording could be used to corroborate the agent's testimony. In other words, the tape recording was limited to corroboration.

As indicated by Note 4 of its opinion quoting from Judge Frank's dissenting opinion on the *Lopez* case in the Circuit Court, by the concurring opinion of Mr. Justice Warren and the dissenting opinion of Mr. Justice Harlan, the *On Lee* decision was wrongly decided and erroneous and the majority of the Court distinguished between the use of a tape recorder for corroboration purposes and the use of a transmitting device, the latter impliedly being a violation of constitutional rights under the Fourth and Fifth Amendments. Mr. Justice Warren in his concurring majority opinion stated:

> "Since I agree with Mr. Justice Brennan that the *On Lee* case was wrongly decided and should not be revitalized, but base my views on grounds different from those stated in the dissent, I have chosen to concur specially. 'I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a grave danger to the privacy of the individual,' that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments."

Mr. Justice Harlan in his dissenting opinion joined by Mr. Justice Douglas and Mr. Justice Goldberg, referring to *On Lee* stated:

> "I believe that that decision was error, in reason and authority, at the time it was decided; that sub-

sequent experience has sapped whatever vitality it may once have had; that it should now be regarded as overruled; that the instant case is rationally indistinguishable; and that, therefore, we should reverse the judgment below.

"The United States, in its brief and oral argument before this Court in the instant case, made little effort to justify the result in *On Lee,* doubtless because it realizes that that decision has lost virtually all of its force as authority. Instead, the government seeks to distinguish the instant case. This strategy has succeeded, it appears, with a majority of my Brethren. The Court's refusal to accord more than a passing mention in its opinion to the only decision of this Court—*On Lee*—factually analogous to the case at bar suggests very strongly that some of my colleagues who have joined the Court's opinion today agree with us that *On Lee* should be considered a dead letter."

In the instant case Sussman gained access to Marchese's apartment not as a known government agent or officer, but fraudulently as a friend and social acquaintance.

In its opinion on May 25th (Appendix "B") for the first time the Circuit Court made a direct ruling on the aforesaid issue of the use of an electronic transmitting device, but its ruling was erroneous and was based on a misinterpretation of the case of *Osborn v. New York,* 385 U.S. 323. In the *Osborn* case no transmitter was involved. A hidden recording device was permitted to be used, being first authorized by two judges of the United States District Court following the filing of an affidavit, which met the requirements of a search war-

rant. Even then the use was under the strict supervision of the court and the use of the tape recording was restricted to corroboration purposes.

The Circuit Court in the instant case ignored the implications of the *Lopez* case and the cases submitted in letter form prior to its decision, namely *Stone v. United States,* 232 F. Supp. 396 and *Hadju v. State of Florida,* 189 So. 2d 230. In the *Stone* case an electronic transmitter was placed under the base of a telephone booth in Dallas, Texas. It was not physically connected with the telephone. The defendant called Las Vegas and placed a bet. His part of the conversation was transmitted to an electronic receiver, several hundred feet away and a recording made. Citing among other the case of *Silverman v. United States,* 365 U.S. 505 and the *Lopez* case, the court excluded the evidence on the ground that there was a violation of defendant's right of privacy under the Fourth Amendment. On page 399, the court stated:

> "Going back to the founding of this country, it is clear that individual privacy was one of the strongest single influences that guided the founders of this country in the establishment of a new nation and the adoption of the Bill of Rights.
>
> "Privacy of a protected area was invaded only by an actual physical intrusion. But today electronic devices without physical presence enables an intrusion upon the air, light and sound waves of a person's property as real as any physical trespass.
>
> "But fundamental rights protected by the Bill of Rights cannot become outdated by technological developments."

"In the light of technological improvements it is clear that an electronic device placed in a protected area by government agents without the knowledge of the defendant and transmitting a telephone conversation is as much physical trespass and violation of the right of privacy as is the making of an unlawful entry, and overhearing the conversation under such circumstances is a violation of the Fourth Amendment."

The *Hadju* case *supra* is directly in point with the instant case. One Behrens, a private investigator was employed by the State Board of Medical Examiners to investigate the purported unlawful practice of medicine by the defendant. His employee, Claire White, equipped with a transmitter concealed in her purse, called on the defendant several times. Their conversations in defendant's apartment were transmitted to Behrens, who overheard the same by means of a radio receiver at a distance from the apartment. At the trial Behrens was permitted over objection to testify what he heard broadcast from the transmitter, and the defendant was convicted. The Appellate Court relying on the implication of the *Lopez* case and the *Stone* case among others, reversed the conviction on the grounds that the defendant's constitutional rights under the Fourth Amendment had been violated. The Court stated, page 232;

"The use of such surreptitiously obtained information violates the right of privacy preserved by the Fourth Amendment of the United States Constitution, which is applicable to the State proceedings. (Citing cases)

"The entry into private permises by an agent of the Government by stealth, fraud and deceit has often been condemned. Perhaps the best discussion of the law is cited in *Gouled v. United States,* 225 U.S. 298.—"

In the case of *Estes v. Texas,* 381 U.S. 532, the Supreme Court reversed the conviction of petitioner. Mr. Justice Warren, in his concurring opinion, joined in by Justices Douglas and Goldberg stated, page 585:

"But the television camera, like other technical innovations, is not entitled to pervade the lives of everyone in disregard of constitutional protected rights."

Note 44-in connection with the above statement refers to the dissenting opinion in *On Lee v. United States, 747, 762; Silverman v. United States,* 365 U.S. 505; *Lopez v. United States,* 373 U.S. 427, 445-446 (concurring opinion) and 465 (dissenting opinion of Mr. Justice Brennan),

In the most recent decision of the Supreme Court, (June 12, 1967) *Berger v. United States,* 35 Law Week 4649, the eavesdropping of the defendant was reversed. The Court admitted that in *Osborn* there was an invasion of privacy protected by the Fourth Amendment, but the recording was admissible because of prior authorization by two United States District Court Judges based upon

"a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice—for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations.

The invasion was lawful because there was sufficient proof to obtain a search warrant for the limited purpose outlined in the order of the judges."

The Court in *Berger* indicated that in *Lopez* there was a distinction between the use of a hidden transmitting device and a recording device. The former is prohibited but the latter was authorized "under the most precise and discriminate circumstances" which fully met the "requirement of particularity of the Fourth Amendment."

In the instant case, while the government agents didn't personally trespass into Marchese's apartment to "bug" the same, they in effect did so by having Sussman carry the "bug" into the apartment at their instigation. He thus gained entry and access by means of fraud, deceit, friendship and social acquaintance. Such entry was held wrongful in the *Hadju* case, *supra,* and in the case of *Fraternal Order of Eagles v. United States,* 57 F. 2d 93; *Gouled v. United States, supra,* 255 U.S. 298.

This Court has granted certiorari in the case of *Katz v. United States,* 369 F. 2d 130 (9th Cir.) and has ordered the same to be heard on October 6th, 1967. The instant case should be heard by this Court as a companion case to *Katz,* since they both involve use of electronic bugs. In fact in the instant case, there was an even greater invasion of the rights of privacy because the transmission took place within the privacy of

Marchese's apartment and there was no tape recording as in *Lopez* and *Osborn*.

It is clear that the Circuit Court's decision herein is in conflict with the decision of this Court and with other cases above referred to with respect to the invasion of rights of privacy under the Fourth and Fifth Amendments by the use of hidden electronic transmitters and this Court should settle the conflict and definitely determine the question, which unfortunately it failed to do in *Massiah v. United States*, 377 U.S. 201.

II.

The United States District Court Judge Thurmond Clarke Had the Jurisdiction and Power to Grant the Petitions for Habeas Corpus Under Section 2243 and/or the Motion Under Section 2255 of Title 28 U.S.C. and to Afford to Petitioners the Relief Granted.

At the time of the hearing on Marchese's petition for habeas corpus, he had already served 4 years and 4 months in prison and had an excellent prison record thereby already entitling him by law for credit on his sentence of more than seventeen months on a ten year sentence or more than thirteen months on a five year sentence in addition to industrial time at the end of the sentence under Sections 4161 *et. seq.* of Title 18, U.S.C.[2] At the time of the hearing on Del Bono's

[2]A portion of the letter from the United States Department of Justice, Bureau of Prisons Federal Correctional Institution, Terminal Island, to Judge Clarke reads as follows:

"Marchese appealed to the Director and other members of the staff to be permitted to remain at this institution to

(This footnote is continued on the next page)

motion and petition, he also had served more than 4 years and 8 months with an excellent prison record and he likewise had already earned a similar credit on his sentence provided by law.

Judge Clarke intended at the hearings to discharge both petitioners because of the violation of their constitutional rights. Out of an abundance of caution in order that the discharge might stand, counsel for petitioners requested that Judge Clarke include in his order that the sentences of petitioners be reduced to five years and that they also be discharged for time served, because those times with good conduct credit they had more than served five year sentences, and Judge Clarke followed the request so made in his orders of discharge. (Appendices "C and D".)

The Circuit Court, ignoring the fact that the proceedings had been instituted both under the motion procedure and habeas corpus, erroneously held that under Section 2255, Judge Clarke's power was limited to (a) vacating and setting the judgment aside and dis-

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facilitate family visiting and to aid in matter pending before your Court. He was assigned to our Culinary Department and close custody quarters because of the nature of his offense and length of sentence. His adjustment was such that after 7 months he was removed from close custody quarters and is now in a regular dormitory. He continues to work in our Culinary Department and is now classified as a butcher's helper. His work report since arrival have been consistently above average. His reports since January of this year have been predominantly outstanding. Because of this and his participation in other self-improvement activities he was granted an award of 2 days per month extra good time which became effective February 1, 1961. This was increased to include a monetary award of $10.00 per month for six months, effective April 1, 1962. You may be interested to know that our monetary awards are granted for specifically prescribed periods because of budgetary limitations."

charging the petitioner, (b) resentencing him, (c) granting a new trial or (d) correcting the sentence. Even though Judge Clarke intended to discharge the petitioners absolutely, as the report of the proceedings shows,[3] the Circuit Court indulging in excessive technicalities and quibbling on words held that he could not grant the relief that he did, even though the effect of his order was a complete discharge. The

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[3]At the hearing a discussion took place between Judge Clarke and counsel for Marchese and the Assistant United States Attorney as follows:

"The Court: Well, Mr. Parsons, I want to ask you a question. I am going to rule with you and I can rule, my thought is, on 2255. He has already been incarcerated four and a half years . . ." [R. T. p. 74].

"Mr. Parsons: I think you can modify. I must respectfully disagree with counsel for the Government. 2255 gives you full power. It says so in it. It followed the old English common law version of coram nobis and they merely put it in the statute-where there is a wrong, there is a remedy." [R. T. p. 74].

"The Court; Well, what I will do, I will dismiss the matter, using section 2255. I will order the defendant discharged at this time, his having served four years and how many months." [R. T. p. 76].

"Mr. Schulman: (Assistant U.S. Attorney) I do not undestand the judgment, Your Honor. . . ."

"The Court: Well, I am dismissing it under 2255.

Mr. Schulman: And you are granting the motion?

The Court: That is right, and I am discharging the defendant now on the theory that he has already served four years and how many months, so many months." [R. T. p. 77].

"The Court: I am doing it under 2255. Then in addition to that I am ordering him discharged, which Mr. Parsons requests, on the theory that he has already served." [R. T. p. 78].

"The Court: I said I am grant relief under section 2255. I am setting aside the sentence . . . I am going to vacate the sentence, but I am going to make it contingent on that and modify the sentence from 10 to 5 years. That is what Mr. Parsons advocates. He could be right and I could be wrong in the matter.

The Court: Well, I am ordering both ways. I am ordering 2255 and then as another condition I am modifying the sentences from ten years to five years."

words "for time served" should have been treated by the Circuit Court as surplusage and it should have disregarded the same, if it was in disagreement with the form of the order of discharge. The Court completely disregarded the fact that petitioners were proceeding both under habeas corpus and Section 2243 of Title 28, and the 2255 motion procedure. Under Section 2243 it is provided that the Court entertaining an application for a writ of habeas corpus *"shall summarily hear and determine the facts, and dispose of the matter as law and justice require"* (Emphasis added). No limitation is placed upon the type of relief which may be granted. Hence, the relief granted by Judge Clarke was unhampered by the restrictions imposed upon him by the Circuit Court.

Its decision was in direct conflict with decisions of other circuits and this Court should settle the matter and resolve the conflict as to the jurisdiction and powers of the District Court to grant such type of relief as it may determine.

In the case of *McKenna v. Ellis*, 280 F. 2d 592, the defendant had served four years of an eight year sentence. The Circuit Court on appeal from a denial of habeas corpus, reversed the District Court and ordered the prisoner discharged for time served. The court stated page 604:

> "The Court's duty upon a habeas corpus proceeding is to 'dispose of the matter as law and justice require.' (28 U.S.C. Sec. 2243; compare 28 U.S.C.A. Sec. 2106) It is our opinion that McKenna's discharge will best serve the ends of justice. (citing cases and 29 C.J.S. p. 690, note 92). The judgment is therefore reversed and the cause remanded with instructions to discharge the prisoner."

In *Powell v. Wiman,* 287 F. 2d 275, after denial of habeas corpus by the lower courts, the Supreme Court granted certiorari and remanded the case to the District Court. The defendant had served five years of his ten year term and the Circuit Court finally ordered him to be discharged for time served, since such relief would serve the ends of justice. The Court cited *Aderhold v. O'Neill,* 66 F. 2d 85; and *Reid v. Sandford,* 42 F. Supp. 300.

It has been declared repeatedly that habeas corpus proceedings are governed by equitable principles. Therefore, it seems manifest that any discharge of petitioners whether absolute, or for time served in the ends of justice, should be upheld as being consonant with equity and justice.

Assume, *arguendo,* that the orders of discharge of petitioners were made by Judge Clarke solely under the provisions of Section 2255. This Court has held on several occasions that the motion procedure and the relief afforded were the material equivalent of and exactly commensurate with habeas corpus. *United States v. Hayman,* 342 U.S. 205; *Hill v. United States,* 368 U.S. 424; and *Sanders v. United States,* 373 U.S. 1. In *Sanders* the Court stated page 15:

> "Indeed, if he (petitioner) were subject to any procedural hurdles which make his remedy under 2255 less swift and imperative than federal habeas corpus, the greatest constitutional doubts would be engendered. We therefore hold that the 'similar relief' provision of section 2255 is to be deemed the material equivalent of section 2244 (2243) . . .
> "Since the motion procedure is the substantial equivalent of federal habeas corpus, we see no need to differentiate the two for present purposes."

Since the above is true, it is clear that in order to do what law and justice require and to serve the ends of justice, Judge Clarke had the jurisdiction and power to discharge petitioners, and the particular means of doing so either by a purported reduction in sentence or by a discharge "for time served" was immaterial. Such language should be disregarded in carrying out his declared intent of discharging petitioners because of the violation of their constitutional rights. Although the Circuit Court in ignoring the rules of appellate review, even those enunciated by it, held the evidence insufficient to support a finding of perjury on the part of Agent Richards and the knowing use or permission of the same by the prosecutor, there was no contradiction by the Government that on three occasions it made use of the hidden electronic transmitter. This, as we have pointed out in Point I, *supra,* was a violation of petitioners' constitutional rights of privacy under the Fourth and Fifth Amendments, and the orders of discharge should be upheld on that ground at least. By failing to do so, the Circuit Court's decision was in conflict with the *Wiman* and *McKenna* cases, *supra,* as well as the cases cited in Point I.

This Court should determine and settle the question as to the nature, extent and type of relief which may be granted under habeas corpus and the motion procedure under Section 2255, because a direct conflict exists between Circuits as to this important subject.

The question seems to be, not whether Judge Clarke or any judge was acting within the scope of the discretion conferred upon him by Sections 2255 and 2243, but rather whether the power to exercise such discretion is conferred by either or both of these statutes.

It is noteworthy that the Ninth Circuit Court never stated that Judge Clarke abused his discretion but held that he had no power to exercise such discretion.

III.

The Circuit Court Had No Jurisdiction and Power to Restrict, Set Aside, Vacate and Reverse the Order of Judge Clarke's Order Discharging Petitioners.

As set forth above, there was no denial of the use by the government agents of hidden transmitter. We have hereinabove contended that such was a violation of petitioners' rights of privacy and that Judge Clarke had the jurisdiction and power to discharge them absolutely or for or by reason of time served in order "to serve the ends of justice."

Since there was a determination that there was "such a denial or infringement of the constitutional rights of the prisoners (petitioners) as to render the judgment vulnerable to collateral attack" under the motion procedure or habeas corpus, Judge Clarke's discretion as to the type of relief granted was sole and absolute and in the absence of abuse of discretion, he had the power to do what he deemed to be fair, just and equitable.

This discretion was not only conferred upon him under habeas corpus and motion procedure, but we submit that it was specifically conferred upon him by the decision of this Court when it granted certiorari, vacated and reversed the judgment of the Circuit Court and remanded the case to the District Court for reconsideration in the light of *Sanders*, 374 U.S. 101

(*supra*). In the opinion of the Circuit Court reversing Judge Clarke's order of discharge (341 F. 2d 782), it cast grave doubts upon the meaning and effect of said Marchese decision of this Court, as well as of the *Sanders* decision.

Upon remand, the District Court in accordance with the mandate of this Court did reconsider and render its judgment of discharge, finding specifically after a hearing that it would be fair, equitable and just to discharge the petitioners. We submit that the Circuit Court could not substitute its opinion as to what was fair, just and equitable to petitioners for that of the District Court, unless the decision had been arbitrary and against petitioners.

It must be remembered that Judge Clarke was the sentencing judge. His discretion in this matter is similar or analogous to the discretion conferred in Rule 35 of Title 18 U.S.C., Rules of Criminal Procedure, wherein the sentencing judge is given the discretion to *reduce* the sentence. It has been held that such discretion is sole and absolute. *Beitel v. United States,* 306 F. 2d 66; *Hall v. United States,* 286 F. 2d 676.

We submit that his discretion as exercised was not subject to the jurisdiction or power of the Circuit Court to reverse and set aside the relief granted, and that his orders of discharge of petitioner Marchese on September 30, 1963 (Appendix "C") and of petitioner Del Bono in December 20, 1963 (Appendix "D") should be upheld and the petitioners discharged.

Conclusion.

For the foregoing reasons, we respectfully submit that this petition for certiorari should be granted, that the orders and judgment of United States District Court Judge Thurmond Clarke discharging petitioners aforesaid be affirmed and that the judgments of the Circuit Court vacating, setting aside and reversing said orders of discharge be reversed and the case remanded to the District Court directing that its orders of discharge be carried out and petitioners be discharged from custody in accordance with said orders.

Respectfully submitted,

BURTON MARKS and
BRUCE I. HOCHMAN,
Attorneys for Petitioner,
Michele Marchese.

RUSSELL E. PARSONS,
Attorney for Petitioner,
Jesse Del Bono.

APPENDIX A.

Order Nunc Pro Tunc.

United States District Court, for the Southern District of California.

Michele Marchese, Petitioner, vs United States of America, Respondent. Civil No. 801-61-TC (Marchese)

Jesse Del Bono, Petitioner, vs United States of America, Respondent. Civil No. 63-1361-TC (Del Bono)

Following the reversal and remand of the above entitled cases by the Court of Appeals for the Ninth Circuit under judgment and opinion made and rendered on February 10th, 1965, and the mandate of said cases to this Court, motions were made by Petitioners herein to file Amended Findings of Fact and Conclusions of Law and an Amended Judgment based thereon, or in the alternative to treat said motions as new motions for relief under Title 28, Section 2255 U.S.C. Said motions were set for hearing on November 22, 1965, before this Court and were opposed by respondent. The hearing thereon was continued to December 6, 1965, and at said time continued to January 5, 1966.

On January 5, 1966, hearing on said motions were had, the petitioner Michele Marchese appearing by his attorneys Burton Marks and Bruce I. Hochman, the petitioner Jesse Del Bono appearing by his attorney Russell E. Parsons, both petitioners, being present, and respondent appearing by United States Attorney Manuel Real, by Assistant United States Attorney John K. Van De Kamp.

At said session, the Court took the matter under submission and continued the matter and the spreading of

the mandate to January 19, 1966. At said session J. Brin Schulman, Assistant United States Attorney appeared for respondent.

On January 19, 1966, the Court held that the decision and order of the Court of Appeals was ambiguous as to the effect of that order reversing the judgment of the District Court and that the Court was uncertain as to its power to modify, amend or alter the previous findings and judgment or to make new and different findings and judgment as urged by the Petitioners, and on that basis, the Court would deny the motions and certify the question of his discretion and/or jurisdiction to the Court of Appeals and permit the Petitioners to remain on bail pending the new appeal.

The Court then continued the matter until January 20, 1966 to enable petitioners to file their Notices of Appeal and to arrange for the posting or the reinstatement of their bonds and also continued the spreading of the mandate.

On January 20, 1966, all parties and their respective attorneys being present, the Court ordered the mandate spread, and the Notice of Appeal by petitioners having been then filed the Court ordered the same bonds to remain in effect pending the appeal and ordered the matter to be certified back to the Circuit Court for further clarification.

It now appearing that no formal order or judgment was made with reference to the aforesaid motions by

petitioners, the Court being of the opinion that the decision, opinion and remand of the Circuit Court were ambiguous in the manner aforesaid, now makes its judgment and order as follows:

It Is Hereby Ordered and Adjudged that petitioners Motions to File Amended Findings of Fact, Conclusions of Law and Judgment, or in the Alternative to Treat Motions as New Supplemental Motions under Sections 2243 and 2255, Title 28 U.S.C. be denied without prejudice pending further clarification by the Circuit Court of Appeals of its opinion and decision reversing and remanding the cases to this Court and in connection therewith the Court orders the above matters and cases to be certified to the said Circuit Court of Appeals for the Ninth Circuit for clarification of its decision, opinion and remand, especially with respect to the jurisdiction and discretion of this Court to alter, modify or amend its previous findings, conclusions and judgment to conform to the order of the Court of Appeals or to make new and different findings, conclusions and judgment in accordance with the mandate of the Court of Appeals, upon the aforesaid motions of petitioners.

It Is Further Ordered that pending such clarification or final determination on appeal of respondents in connection with these matters, the petitioners shall remain on bail on the same bonds heretofore posted.

It Is Further Ordered that this judgment and order be filed and entered *nunc pro tunc* as of January 20,

1966, prior to the filing of their respective Notices of Appeal.

In view of the above order certifying these matters to the Circuit Court for clarification, this Court makes no findings or conclusions of the merits of the motions of petitioners as new or supplemental motions under Sections 2243 and 2255, Title 28 U.S.C. reserving the determination of such questions following further clarification of its decision, opinion and mandate by the Circuit Court.

Dated: This 26th day of April, 1966.

/s/ Thurmond Clarke
Judge of the United States District Court

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Michele Marchese, Appellant, vs. United States of America, Appellee.

Jesse Del Bono, Appellant, vs. United States of America, Appellee. No. 20,893.

[May 25, 1967]

Appeal from the United States District Court for the Central District of California.

Before: Barnes and Jertberg, Circuit Judges; and Smith,* District Judge.

Barnes, Circuit Judge:

On February 10, 1965, this court referred to the legal maneuvers of appellants to avoid imprisonment (341 F.2d 782), after their conviction in 1958 by a jury (and the affirmance of their convictions in 1959 by this court) of selling two pounds of heroin. Their petitions for a writ of *certiorari* were denied by the Supreme Court. 360 U.S. 930 (1959) and 360 U.S. 938 (1959). This court described the matter as "extraordinary," on their second appeal. The appellants' freedom on bail as of this date is even more extraordinary; and a sad commentary on how delays can be achieved that destroy any faith in the certainty of punishment for crime.

*Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

Appellants were convicted and the conviction affirmed. 264 F.2d 892 (9th Cir. 1959). Motions under § 2255 were denied in 1960, and reconsideration of those motions was denied in 1961. Writs of habeas corpus were denied, and the denial affirmed by this court. 304 F.2d 154 (9th Cir. 1962). *Certiorari* was granted by the Supreme Court and the matter was returned "for reconsideration in light of *Sanders v. United States*, 373 U.S. 1." 374 U.S. 101 (1963). On remand Hon. Thurmond Clarke modified the original sentence. On appeal from that modification (341 F.2d 782 (9th Cir. 1965)) we:

(1) Determined that Judge Clarke's action in reducing the sentences of Marchese and Del Bono and ordering their immediate release exceeded his jurisdiction and that of his court;

(2) Reversed the erroneous judgment as to each of the then appellees; and

(3) Ordered that Marchese and Del Bono be remanded to custody forthwith.

A petition for rehearing was denied by this court (March 3, 1965), and *certiorari* was denied by the Supreme Court. 382 U.S. 817 (1965).

Thereafter, and on January 19 and 20, 1966, the Hon. Thurmond Clarke spread the mandate of this court, and denied each appellants' respective motions entitled: "Motion to file Amended Findings of Fact, Conclusions of Law and Judgment, or in the Alternative to Treat Motion as New Supplemental Motion under Sections 2243 and 2255, Title 28, U.S.C." (C.T. 143 and 253.) and denied the motions to discharge petitioners from custody. (C.T. p. 196.) "Amended

Findings of Fact and Conclusions of Law following Reversal and Remand by Circuit Court of Appeals" were proposed and lodged (C.T. pp. 166-178, 258-268), but neither filed nor signed. This is an appeal from the denial of said motions.[1]

Thus, fifteen months after the district court's denial of the petitioners' motion and some twenty-eight months after the entry of judgment and order of the district court freeing the petitioners from prison (which order was found by this court of appeals to be illegal), the petitioners are still at large on bail.

We affirm the order of the district court below, denying each and all of the petitioners' motions which are the subject of this appeal. The opinion of this court, filed February 10, 1965, is the law of the case. We hold that Hon. Thurmond Clarke had to authority to do what he purported to do. We neither suggested nor implied that he was required to make any other or further findings. He was not in error in refusing to do so on January 19 and 20, 1966.

No new matters, not heretofore passed upon, are raised on this appeal. We were asked in oral argument to anticipate what the Supreme Court of the United States might say or do in *Katz v. United States*, 369 F.2d 130, *certiorari granted* March 13, 1967, and further to anticipate that whatever that Court might say or do would be held retroactive in effect.

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[1]An order nunc pro tunc denying the motions and "certifying" the cases to the Court of Appeals for the Ninth Circuit for clarification of its decision, opinion and remand in *United States v. Marchese*, 341 F.2d 782 (9th Cir. 1965) was entered April 26th, 1966. *The petitioners were permitted to remain on bail.* A separate amended and supplemental notice of appeal was then filed. (C.T. pp. 279; 280-1.)

This we decline to do. We prefer to follow, as we must, the last views expressed by the majority of the Supreme Court in *Osburn v. United States*, 385 U.S. 323 (1966). Here, as in *Osburn, supra*, the electronic device was used by and with the consent of one party to a conversation to make an accurate record thereof. The tape recording did not involve "the surreptitious surveillance by an outsider."

The order of the Hon. Thurmond Clarke refusing to file amended findings of fact and conclusions of law, or to treat the motion as supplemental, is in all respects affirmed, and we again *order the appellants remanded to custody forthwith.*

APPENDIX C.

Judgment.

United States District Court for the Southern District of California, Central Division.

Michele Marchese, Petitioner, vs. United States of America, and Preston Smith, Warden of United States Correctional Institution at Terminal Island, California, Respondent. Civil No. 801-61-T.C. (Ancillary to Case No. 26762 C.D.)

The Petition of Michele Marchese for a Writ of Habeas Corpus, together with Return thereto of Respondent, United States of America, the Supplemental Memorandum of Petitioner, Respondent's Supplement to the Return, etc., and the Reply of Petitioner thereto, came on for hearing before the Honorable Thurmond Clarke, United States District Court Judge, on the 4th day of September, 1963 at 2:00 P.M., Petitioner appearing by Russell E. Parsons, his attorney, and Respondent appearing by the United States Attorney, Francis C. Whelan, by J. Brin Schulman, Assistant United States Attorney, and after a partial hearing a continuance was ordered to September 9th, 1963. Evidence, oral and documentary was introduced, and the Court having considered the matter and having made its writting Findings of Fact and Conclusions of Law, now makes its order and renders judgment as follows:

It Is Adjudged that the sentence of Imprisonment heretofore imposed June 16th, 1958 for ten years imprisonment in the custody of the Attorney General of the United States on each of ten Counts to run concurrently, be and the same is hereby modified, reduced and corrected to be five years in the custody of the

Attorney General of the United States on each of ten Counts to run concurrently.

It Is Adjudged that defendant and petitioner has spent in excess of four years in custody of the Attorney General of the United States, and it appears that by reason of his good conduct in custody he has earned such good time as would render his immediate release appropriate.

It Is Adjudged that defendant an petitioner be immediately released from custody.

Dated at Los Angeles, California this 30th day of September, 1963.

Thurmond Clarke
District Judge

APPENDIX D.

Judgment.

United States District Court for the Southern District of California, Central Division.

Jesse Del Bono, Petitioner, vs. United States of America, and R. W. May, Warden of United States Correctional Institution at Terminal Island, California, Respondent. Civil No. 63-1361-TC (Ancillary to Case No. 26762 CD).

The Petition of Jesse Del Bono to Annul, Vacate and Set Aside and/or to Modify the Judgment of Conviction in Case No. 26762-CD, filed pursuant to the provisions of Title 28 U.S.C. Sections 2255 and 2243 and the Opposition thereto filed on behalf of the Respondent, United States of America, came on for hearing on the 19th day of November, 1963, before the Honorable Thurmond Clarke, United States District Judge, the Petitioner appearing by Russell E. Parsons, his attorney, and the Respondent appearing by the United States Attorney Frances V. Whelan, by J. Brin Schulman, Assistant U.S. Attorney. The matter was then continued and came on for hearing on the 11th day of December, 1963, before said Judge.

At said hearing it was stipulated that the records, files and exhibits in the case of Marchese v. U.S. Civil No. 801-61-TC heard by the above Court and that the reporter's transcript in said case introduced in evidence at the hearing, might be deemed to be introduced in evidence by reference and considered by the Court as well as the reporter's transcript in the aforesaid ancillary case of U.S. v. Marchese and Del Bono.

The Court having heard the evidence and considered the matter, and having made its Findings of Fact and Conclusions of Law, now makes its order and renders judgment as follows:

It Is Adjudged that the sentence of Imprisonment heretofore imposed June 16th, 1958 upon petitioner Jesse Del Bono for ten years imprisonment in the custody of the Attorney General of the United States on each of four counts to run concurrently, be and the same is hereby modified, reduced and corrected to be five years in the custody of the Attorney General of the United States on each of ten Counts to run concurrently.

It Is Adjudged that said defendant and petitioner has spent in excess of four years and eight months in custody of the Attorney General of the United States, and it appears that by reason of his good conduct in custody he has earned such good time as would render his immediate release appropriate.

It Is Adjudged that defendant and petitioner be immediately released from custody.

Dated at Los Angeles, California this 20th day of December, 1963.

Thurmond Clarke
District Judge